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No. 83-

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

OFFICENTERS INTERNATIONAL CORP. OF ATLANTA,

Petitioner,

versus

INTERSTATE NORTH ASSOCIATES,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

APPENDIX TO PETITION

WINFORD KENT BISHOP
Counsel for Petitioner
1835 First Atlanta Tower
Two Peachtree St., N.W.
Atlanta, Georgia 30383
(404) 658-1110

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[March 11, 1983]

65253. OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA v. INTERSTATE NORTH ASSOCIATES. [Sh-233]

166 Ga. App. 93

SHULMAN, Chief Judge.

Appellee filed this dispossessory action against appellant on November 23, 1981. Neither the affidavit for writ of possession or a subsequent amendment made any demand for relief other than "removal of the said defendant together with his property from said premises." After hearing on December 18, 1981, the trial court ordered appellant to pay into the registry of the court by December 21 alleged past due rent totaling $340,370.17 as a condition to appellant's continued possession pending final determination of the right to possession. Appellant failed to pay

this sum by the date ordered, and on December 31 the trial court issued a writ of immediate possession, which was executed on January 7, 1982.

Subsequent to the issuance of the writ of possession, both parties filed various motions and initiated discovery. However, on February 11, 1982, the trial court issued an order [end page 1] denying all pending motions and vacating all rulings made after December 31, 1981, on the ground that the only issue in the case at the time the writ was issued concerned appellee's claim for immediate possession. The trial court reasoned that the action was finally adjudicated with the issuance of the writ, since no issue remained for adjudication. See Leverette v. Moran, 153 Ga. App. 825, 827 (266 SE2d 574).

Appellant took an appeal from that order to the Supreme Court, raising

several questions concerning the constitutionality of Code Ann. § 61-304 (OCGA § 44-7-54) and its application in this case. The Supreme Court transferred the case to this court without opinion.

We agree with appellee that the trial court's order of February 11, 1982, was correct. The affidavit accompanying the dispossessory warrant stated an amount of past due rent but "made no demand for any rent due, and made no prayer for judgment in any amount. The allegation that the rent was unpaid was, in the context of this affidavit, nothing more than [appellee's] cause of action for the writ, the gist of [its] complaint for eviction." Leverette, supra, p. 826. "It is true that generally the tenant's failure to pay into the registry determines only his right to remain on

the premises [2] pending determination of the other issues . . . but in this case the only issue was possession. When the writ issued on [December 31, 1981], the landlord had gotten all [it] asked for. The process was at an end. The [subsequent proceedings] . . . [were] not proper, for there was no suit pending and nothing [on which to proceed]." Id., pp. 827, 828. See also Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813 (2) (256 SE2d 785).

The trial court's order of February 11 correctly determined that the December 31 writ constituted the final judgment in this action. This court lacks jurisdiction to review the merits of that final judgment, since no appeal was taken within 30 days of its entry. Code Ann. § 6-803 (a) (OCGA § 5-6-38 (a)); Stonecypher v. White, 161 Ga. App. 473 (289 SE2d 829). Furthermore,

pursuant to Mitchell, supra, p. 816, "any issue as to appellant's right to possession of the premises has become moot."

Judgment affirmed. Quillian, P. J., Deen, P. J., Banke and Birdsong, JJ., concur. McMurray, P. J., Carley, Sognier and Pope, JJ., dissent. [3]

DECIDED MARCH 11, 1983 -

REHEARING DENIED MARCH 30, 1983 -

CERT. APPLIED FOR.

Dispossessory. Cobb State Court. Before Judge Cauthorn.

W. Kent Bishop, Shane M. Geeter, for appellant.

William N. Withrow, Jr., Ralph H. Greil, Nancy O. Ewing, for appellee.

[65253. OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA v. INTERSTATE NORTH ASSOCIATES Sh-233]

CARLEY, Judge, dissenting.

I respectfully dissent from the majority's decision to affirm the trial court's order of February 11, 1982, which order held that the proceedings in this case were, in effect, terminated on December 31, 1981 with the issuance of a writ of possession. The trial court and the majority in this case primarily rely upon Leverette v. Moran, 153 Ga. App. 825 (266 SE2d 574) (1980). The facts of this case are different from those in Leverette and therefore the holding in Leverette is not dispositive of the issue with which we are faced. The affidavit seeking the writ of possession filed in Leverette had absolutely no allegation or averment whatsoever

dealing with past due rent. In the case sub judice, there was added to the form affidavit the following language: "and that [1] defendant is indebted to Plaintiff for past due rent in the total amount of $340,370.17." Although in February of 1982 the trial court decided that the writ of possession entered in December of 1981 terminated all issues, the findings and conclusions which form the predicate for the very writ of possession referred to clearly indicate to the contrary. In the order containing the findings of fact and conclusions of law with regard to the trial court's determination of the amount of rent to be paid into the registry of the court pursuant to Code Ann. § 61-304, the trial court stated as follows: "The Court's findings herein relating to the amount of rent owed to Plaintiff by Defendant and the

substantial completion of the premises by Plaintiff were based on the evidence presented at the above-described hearing, and do not constitute a final determination of these issues, which are expressly reserved for determination by a jury." The defendant did not pay the $340,370.17 as ordered by the court within the short time allotted and, therefore, a writ of possession was issued and executed. However, during the interim between the entry of writ of possession on December [2] 31, 1981 and the February 11, 1982 order which is the subject of this appeal, both parties filed motions, pursued discovery and obtained various orders from the court. It is my opinion that the record in this case clearly shows that the December 31, 1981 order resolved, at most, the issue of possession and that all other issues remain for further determination.

Accordingly, I would reverse the judgment of the trial court and remand the case for resolution of those issues.

I am authorized to state that Presiding Judge McMurray, Judge Sognier and Judge Pope join in this dissent. [3]

COURT OF APPEALS

OF THE STATE OF GEORGIA

ATLANTA, March 30, 1983

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

65253.

Officenters International Corp. of Atlanta v. Interstate North Associate [sic]

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE ATLANTA, March 30, 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Alton Hawk, CLERK

IN THE STATE COURT FOR THE COUNTY OF COBB

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	
-vs-	)	CASE NO. 81A10998
OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA,	)	
Defendant.	)	

- - -

Proceedings before The Honorable TOM CAUTHORN, on the 18th day of December, 1981. [T-1]

THE COURT: The burden is on the Plaintiff to show the amount. [T-2]

THE COURT: I believe I have heard enough on the sound thing to really bar payment of rent, unless the Plaintiff at this time is going to offer some kind of clear and convincing evidence to let the evidence preponderate in the Plaintiff's direction on that. According to Schedule

E, which I have reviewed, Exhibit E, Paragraph 1 deals with the approval of the plans.

4B deals with it being the duty of the lessor's architect to prepare the specifications for the construction of the space. It is clear, therefore, from the lease itself that if there are any design defects in the premises, it is due to the specifications and plans prepared by the landlord, and not by the tenant. Therefore, if sound is being transmitted from room to room, I certainly think I am entitled to conclude for purposes of this proceeding that under the lease there could not possibly be imposed a burden on the Defendant to pay rent to the Plaintiff.

You can offer any evidence or proof you wish. I think I am entitled to shorten it in that regard. [T-30,31]

THE COURT: * * * What I am looking for is, as a matter of fact, was the premises substantially complete in order to invoke the payment provisions of the lease? That is basically the issue before the Court for purposes of this hearing; is that right? [T-38,39]

THE COURT: I will tell you -- I will simplify the issues. I find the evidence evenly balanced on the question of substantial completion, and I will resolve that against the party with the burden and find in favor of the Defendant on that. * * * I find in your favor on the rentals. [T-45,46]

THE COURT: * * * I find in favor of the Plaintiff on construction costs of $340,000, plus whatever it is. You will need to prepare findings and conclusions, Counsel, unless both parties waive it in writing. I will sign the order once you submit it.

MR. WITHROW: Can we have some direction as to the time within which the Court will require the payment of the sum into the court?

THE COURT: I would imagine by 5:00 p.m. on the day the order is filed. I see no reason to delay the time of the order. * * *

[DEFENDANT'S COUNSEL:] Your Honor, may I respond in this manner? Now, Your Honor, we would request that Your Honor consider the -- allowing the tenant here to post a bond in the amount of the amount owed rather than pay cash into the court for a couple of reasons: First of all, the cost of money being substantial; secondly, a bond would provide just as much assurance to the landlord as would cash being into the court; and, third, the clerk's office is not really a financial institution, Your Honor, and it would be more

efficient for them to handle a bond in that amount. And we'd request that Your Honor consider allowing the tenant to post a bond instead of paying cash into the court. [T-49 to 51]

THE COURT: What was the figure exactly, Counsel? You gave it to me earlier.

MR. WITHROW: $340,000 -- just a second. $340,370.17.

THE COURT: That is to be paid into the court by 5:00 p.m. Monday in cash.

[DEFENDANT'S COUNSEL:] I promised Your Honor that I had only one more point, but I am afraid I have to abbregate on that.

THE COURT: * * * I had a motion last Friday that a check is not payment, and there is a Georgia case on all fours, so a check won't do, either. It is going to have to be in cash or some sort of certified money to be in

compliance with the order.

[DEFENDANT'S COUNSEL:] One more point, Your Honor * * *"

THE COURT: Counsel, I know you have made a forceful argument on behalf of your client. The Court has ruled. I am sure you are not quibbling with the Court. That is the end of the proceedings. [T-53,54]

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	
v.	)	DISPOSSESSORY PROCEEDING NO. 81A-10998
OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-styled case having come on for hearing before this Court on Friday, December 18, 1981 for the purpose of determining the amount of rent to be paid into the Registry of this Court pursuant to Ga. Code Ann. § 61-304, and both parties being represented by counsel, and the Court having heard the evidence and considered the arguments of counsel, the Court hereby finds and determines as follows:

FINDINGS OF FACT

1.

On or about March 11, 1981, Plaintiff and Defendant entered into a Lease Agreement (hereinafter "Lease Agreement") for the premises located at Suite 400, Building 360, Interstate North Office Park, Atlanta, Georgia (hereinafter "the subject premises").

2.

On November 23, 1981, Plaintiff herein filed its Affidavit in support of its Dispossessory Warrant, seeking a Writ of Possession for the subject premises.

3.

Defendant herein filed its Answer and Counter Affidavit on December 7, 1981.

4.

Defendant has failed to pay any rent into the Registry of this Court since the inception of this action.

5.

Defendant currently retains possession of the subject premises.

6.

Inasmuch as Defendant has demanded a jury trial of the issues involved in this action, the issue of the right of possession cannot be determined within one month from the date of Plaintiff's original Affidavit in support of its Dispossessory Warrant of November 23, 1981.

7.

Plaintiff has demanded of Defendant, and Defendant has failed to pay, construction costs (expressly defined as rent under Paragraph 8 of the Lease Agreement) for the subject premises in the amount of $340,370.17.

8.

With regard to the evidence introduced at the hearing, concerning

substantial completion of the premises by Plaintiff, the Court finds the evidence on that issue to be equally balanced.

CONCLUSIONS OF LAW

1.

Inasmuch as all amounts owed the Plaintiff by Defendant under the Lease Agreement are defined as rent, the sum of $340,380.17 [sic] is past due and owing as rent under the Lease Agreement.

2.

Pursuant to the provisions of Ga. Code Ann. § 61-304, Defendant is required to pay into the Registry of this Court the sum of $340,370.17 (Three Hundred Forty Thousand, Three Hundred Seventy Dollars and Seventeen Cents) as past due rent.

3.

The obligation of Defendant to pay base monthly rental commencing on December 1, 1981, is contingent upon the

Plaintiff substantially completing the premises for occupancy by Defendant.

4.

Because the evidence of substantial completion does not preponderate in favor of either party, the Court finds that Defendant is not required to pay base monthly rental into the Registry of this Court at this time.

5.

The Court's findings herein relating to the amount of rent owed to Plaintiff by Defendant and the substantial completion of the premises by Plaintiff were based on the evidence presented at the above-described hearing, and do not constitute a final determination of these issues, which are expressly reserved for determiantion by a jury.

An Order embodying the Court's rulings at the hearing held on Friday, December 18, 1981 and premised upon the

above Findings of Fact and Conclusions of Law is being entered contemporaneously herewith.

SO FOUND AND DETERMINED, nunc pro tunc as of December 18, 1981, this 21st day of December, 1981.

/s/ Tom Cauthorn

JUDGE, STATE COURT OF COBB COUNTY

[Entered at 3:06 p.m., December 21, 1981]

SUBMITTED BY:

/s/ William N. Withrow, Jr.
William N. Withrow, Jr.
TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
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Atlanta, Georgia 30303
(404) 658-8037
Attorney for Plaintiff

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	
v.	)	DISPOSSESSORY PROCEEDING NO. 81A-10998
OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA,	)	
Defendant.	)	

ORDER

The above-styled case having come on for hearing before this Court on Friday, December 18, 1981 for the purpose of determining the amount of rent to be paid into the Registry of this Court pursuant to Ga. Code Ann. § 61-304, and both parties being represented by counsel, and the Court having heard the evidence and considered the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Defendant [~~and/or its transferees or assignees~~ /s/ T.E.C.] be required to pay into the Registry of this Court past due rent in the amount of $340,370.17 (Three Hundred Forty Thousand, Three Hundred Seventy Dollars and Seventeen Cents) no later than 5:00 p.m. on Monday, December 21, 1981.

IT IS FURTHER ORDERED that, in the event Defendant fails to make the payment as required by this Order, a Writ of Possession should issue instanter upon application of the Plaintiff.

SO ORDERED, nunc pro tunc as of December 18, 1981, this 21 day of December, 1981.

/s/ Tom Cauthorn
JUDGE, STATE COURT OF COBB COUNTY

SUBMITTED BY:

/s/ William N. Withrow, Jr.
William N. Withrow, Jr.
TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
1400 Candler Building
Atlanta, Georgia 30303
(404) 658-8037
Attorney for Plaintiff

IN THE STATE COURT FOR THE COUNTY OF COBB

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	
-vs-	)	CASE NO 81A10998
OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA,	)	
Defendant.	)	

- - -

Proceedings before The Honorable TOM CAUTHORN, on the 31st day of December, 1981. [T-1]

- - -

THE COURT: Gentlemen, come forward and take the seat at counsel table. This matter is before the Court on a motion for writ of possession this afternoon; is that correct? [T-2]

THE COURT: What assets did the Officenters International Corporation of Atlanta have prior to the negotiating of

the lease with the Plaintiff in question, other than the $200 balance in the checking account?

[TENANT'S FORMER PRESIDENT:] Actually it was a leasehold corporation, Your Honor.

THE COURT: Did it hold any other leases, cash, deposits, receivables, anything of any value other than --

THE WITNESS: No, sir. The express purpose of that corporation was to hold this lease. [T-46]

THE COURT: The burden is on the Movant. You would have the right to open and conclude argument. [T-47]

THE COURT: There is testimony that the net worth [of the parent corporation, Officenters International Corp.] is greater than the subsidiary [tenant], but that testimony is not saying very much, Counsel. [T-54]

THE COURT: There is no doubt there was correspondence sent to me on the 21st, but as you well know, my secretary nor I are depositories of official records as far as this Court is concerned. * * * [T-59]

THE COURT: * * * I appreciated your letter in the same sense that I appreciate the arrival of the morning newspaper from the Atlanta newspapers in Atlanta, and I read it, and I put it on my secretary's desk for filing within the internal files in my office. * * * [T-60,61]

THE COURT: * * * Subsequent proceedings to enforce a writ of possession could be expensive. If the Officenters International Corporation chooses to disobey and frustrate this Court's writ of possession, the Court submits that it perhaps is exposing itself not only to further

proceedings civilly, but also criminal contempt and/or civil contempt remedies.

The president of Officenters International Corporation is watching me as I speak, and if either he or any of his minions intentionally operate to furstrate the order of this Court, they will similarly expose themselves individually to civil and/or criminal contempt sanctions of the Court. The writ of possession prayed for is issued instanter. [T-70, 75, 76]

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	DISPOSSESSORY PROCEEDING
v.	)	NO. 81A-10998
OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA,	)	
Defendant.	)	

WRIT OF POSSESSION

Plaintiff's Motion for Writ of Possession having been duly noticed and having come on regularly for hearing, and the Court having considered the evidence and the arguments of counsel, it is

HEREBY ORDERED, ADJUDGED and DECREED that a WRIT of Possession is granted in favor of Plaintiff and that Plaintiff be placed in immediate possession of the premises located at Suite 400, Building

360, Interstate North Office Park, Atlanta, Georgia.

IT IS FURTHER ORDERED that, in the event Defendant fails to voluntarily surrender possession and vacate the subject premises by 8:00 A.M. on Monday, January 4, 1982, the Marshall shall, pursuant to Ga. Code Ann. § 61-304(c), enforce this Writ of Possession as provided by law and shall remove the Defendant from the subject premises and place the Plaintiff landlord in full possession of the subject premises by 5:00 P.M. on Monday, January 4, 1982.

SO ORDERED, this 31st day of December, 1981.

/s/ Tom Cauthorn ,
Judge Thomas E. Cauthorn,
STATE COURT OF COBB COUNTY

SUBMITTED BY:

/s/ William N. Withrow, Jr.
William N. Withrow, Jr.
TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	Summons of Dispossessory
v.	)	Warrant No. 81A-10998
OFFICENTERS INTERNATIONAL CORP. OF ATLANTA,	)	
Defendant.	)	

RULE NISI ORDER

It is hereby ORDERED that all pending Motions in the above-styled proceeding, including Defendant's Motion for Leave to File Supplemental, Amended Answer, Counterclaims, and Counter-Affidavit (previously scheduled by the Clerk's office to be heard at 9:00 a.m. on Wednesday, March 10, 1982) and Plaintiff's Motion to Amend and Supplement Dispossessory Warrant and Complaint and to Add Party Defendant, are

set down to be heard at 1:30 p.m. on February 5, 1982, in Courtroom "C" of the State Court of Cobb County. This Order expressly supercedes the Rule Nisi Order entered by the Clerk of this Court on January 25, 1982.

So ORDERED, this 28th day of January, 1982.

/s/ Tom Cauthorn
Thomas E. Cauthorn
Judge, Cobb County State Court

Submitted by:

/s/ William N. Withrow
William N. Withrow [sic]
TROUTMAN, SANDERS, LOCKERMAN
& ASHMORE
1400 Candler Building
Atlanta, Georgia 30043
(404) 658-8000
Attorney for Plaintiff
Interstate North Associates

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	
vs.	)	CASE NO. 81A10998
OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA,	)	
Defendant.	)	

Proceedings before Honorable Tom Cauthorn, Judge of said Court, on the 5th day of February, 1982. [T-1]

THE COURT: * * * This matter is before the Court on numerous motions this afternoon. [T-2]

THE COURT: All right, sir. Counsel, the burden is on the movant, in this case the Defendant, under Rule 13 of the Civil Practice Act in a motion to add a late Counterclaim. * * * [T-4]

THE COURT: What kind of action did you originally file in Superior Court that was dismissed?

[DEFENDANT'S COUNSEL:] That was to enjoin. Well, it was filed by another party, Your Honor. [T-13]

THE COURT: I am going to grant [Defendant's] motion to amend and add the late counterclaims that have arisen prior to the institution of proceedings on the grounds that justice requires the addition of those claims by late counterclaim under Rule 13. * * * So I do allow those later counterclaims. [T-23] * * * You all can amend your Answer and responsive pleadings, as I understand, anytime up to a verdict. I believe that is right. [T-24]

THE COURT: In fact, there was almost an effort to do that, as I recall, at the last hearing we had on this, where I gave some instructions

to the parties about their possible exposure under civil and contempt proceedings.

MR. WITHROW: That is true, Your Honor.

THE COURT: Civil and criminal contempt. I recall there being some rhetorical question perhaps, but nonetheless a question posed as to whether that bounds the New York parent corporation. So there is that danger that has already arisen in the Court. [T-36, 37]

THE COURT: Of course, now, you will admit, counsel, your client has been pushing at that barn door with Counts One through Four in the Counterclaim to get that rusty hinge open so we can broaden the issues in this case. I mean, we have got fraud and conspiracy and heaven knows what else involved. [T-37, 38]

THE COURT: * * * Okay. Well, I will reserve ruling, then, on the Amendment of the 20-1404, malicious abuse, malicious use, and adding the parent as a additional Party Defendant under Rules 20, 19 and 25C of the Civil Practice Act.

You can address that in your letter brief by 5:00 Monday. [T-44, 45]

THE COURT: * * * And it increases their bargaining position, and they [tenant] want the floor; don't they?

MR. WITHROW: That is right, Your Honor.

THE COURT: At the old rate, and you [landlord] want to lease it at the new one. I mean, basically is that the case? [T-49, 50]

THE COURT: * * * I will specially set it first out 9:00 a.m. Monday the 12th. [T-50, 51]

THE COURT: * * * So I am going to shorten the response time to

Interrogatories to 10 days from service instead of 30. [T-55, 57]

MR. GREIL: Let me clarify that if I can, Your Honor. We are asking for the Interrogatory responses to be, as I now understand you, 10 days. Is that for the subsidiary, both subsidiaries?

THE COURT: They are here. They have their lawyer here. They have notice and opportunity to be heard on the point, even though they are not a party. [T-58]

THE COURT: Well, it is not a question of what the Court wants to do. I want to be fair. I want everybody to have an adequate opportunity to respond, I mean to get ready after my Order is entered. * * * [T-60]

THE COURT: Yes, sir. Those motions were all moved forward substantially until today, along with the same order.

Those considerations were taken by the Court, and I feel that you have had sufficient notice. You are here representing both parties.

I think the classic provisions of the due process clause has been complied with, and it is my judgment that the Civil Practice Act provides flexibility in exigent circumstances.

I believe this case is one where things need to be handled not in a piecemeal fashion, but as expeditiously as possible, of course, having due regard for everybody's opportunity to be heard. [T-63, 64]

THE COURT: I'd like the record to reflect and the Order to provide that there was no showing of prejudice.

If there are no further matters, gentlemen, I will enter a written Order on today's proceedings. It will be

entered nunc pro tunc. I will ask you to prepare it, counsel.

There will be a supplemental Order entered next week dealing with reserved issues. Today's Order will deal with expedited discovery, the special setting, and the addition of the four Counts by late Counterclaim.

Anything else?

MR. WITHROW: No. Thank you, Your Honor. We will present that on Monday. [T-64, 65]

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

INTERSTATE NORTH ASSOCIATES,	)	
Plaintiff,	)	
v.	)	81A-10998
OFFICENTERS INTERNATIONAL CORP. OF ATLANTA,	)	
Defendant.	)	

O R D E R

Plaintiff Interstate North Associates files Motions to Amend and Supplement Dispossessory Warrant and Complaint and to Add Party Defendant and a Motion for Expedited Discovery and for a Special Trial Setting. Defendant Officenters International of Atlanta files a Motion for Leave to File Supplemented Amended Answer. The Court heard oral argument and orally announced a partial Order granting Defendant's

Motion reserving judgment on Plaintiff's Motion on February 5, 1982. After review of all pleadings, affidavits, briefs, and all other matters in the record, this Court hereby orders the following:

A brief discussion of the procedural history and context of this case will assist in understanding what the Court holds today. On November 23, 1981, Plaintiff filed an Affidavit for Summons of Dispossessory Warrant with the State Court of Cobb County. Defendant filed its answer and counter-affidavit and a demand for jury trial on December 7, 1981. On December 18, 1981, Plaintiff filed an Amendment of its Dispossessory Warrant. On December 21, 1981, the Court ordered Defendant to pay $340,370.17 into the registry of the Court by 5:00 P.M. on December 21, 1981 pursuant to Georgia

Code Annotated Section 61-304. Defendant failed to do so. Plaintiff filed a Notice of Motion for Writ of Possession on December 23, 1981. On December 31, the Court granted Plaintiff's motion and ordered an immediate writ of possession to issue. Between January 1 and February 5, 1982, Plaintiff and Defendant filed the motions this Court rules on today with accompanying briefs. In addition, Plaintiff filed Notices to Take Depositions, First Continuing Interrogatories and a Motion to Produce.

On February 5, this Court heard arguments of counsel, orally ruling on some of the parties' motions while taking others under consideration for later decision. The Court directed Plaintiff's counsel to prepare and submit by February 8 a nunc pro tunc Order on the motions ruled on by the

Court on February 5, 1982. The Court also directed the parties to submit any briefs on points reserved for decsion by the Court.

On February 8, 1982, Plaintiff's counsel brought to the Court's attention the case Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980). The Court, upon consideration of Leverette, pleadings, the briefs of counsel, and the record, holds that it was error to allow any proceedings after the December 31, 1981 Immediate Writ of Possession as that proceeding was a final determination of all claims in the case at bar, thus rendering all of the parties' subsequent motions moot.

Leverette holds that in a dispossessory action where a landlord fails to demand a judgment for rent in its dispossessory affidavit warrant, the entry of an immediate writ of possession

due to the tenant's failure to pay money into the registry of the Court as required by Georgia Code Annotated Section 61-304 constitutes a final judgment. Id. The Court states:

> In this case the landlord Moran asked for possession and nothing else . . . The [requirement of] payment of $600 [into the registry of the court] must be considered as the equivalent of a bond payable by the tenant authorizing him continued possession pending the determination of the right to possession. The defendant Leverette refused to pay $600 into the court registry, thereby "submitting without contest" to all that Moran demanded. Immediate writ of possession issued, thus ending the only controversy . . . When the writ issued on January 5, the landlord had gotten all she asked for. The process was at an end. The amendment on January 10, . . . was not proper, for there was no suit pending and nothing to amend.

Leverette, 153 Ga. App. at 827-28 (cits. omitted).

It is clear from Mr. Withrow's affidavit that there is no demand made for payment of past due rents. Although

the summons provides that "a judgment may be entered . . . for all rents due" against the Defendant in the dispossessory proceeding, this printed statement of the Clerk's office purports to grant Plaintiff relief for which it has not prayed and as such, it is null and void. Moreover, Defendant itself states in the 8th Defense of its amended answer that no demand for payment was made by Plaintiff. Defendant's Supplemental Amended Answer, Counterclaims and Counter Affidavit at 4 (filed 1/25/82). See Dispossessory Warrant and Affidavit, Plaintiff's Amendment to Dispossessory Warrant. Thus, in the case at bar, as well as in Leverette, the Plaintiff got all it asked for on December 31, 1981. Nothing remains for this Court to decide. Since the Defendant's counterclaims were first raised on January 25, 1982, they were

raised after the immediate writ of possession was granted. After December 31, 1981, there was no suit pending and thus nothing left for the parties to amend.

NOW, IT IS THEREFORE ORDERED AND ADJUDGED that the Court vacates its oral ruling made from the bench on Friday, February 5, 1982, as the Court was in error by such a ruling and the proceedings in this case were at an end on December 31, 1981. Accordingly,

(1) Defendant's Motion for Leave to File Supplemented Amended Answer, Counterclaims, and Counter-Affidavit is denied as untimely and moot;

(2) Plaintiff's Motion to Amend and Supplement Dispossessory Warrant and Commplaint and to Add Party Defendant is denied as untimely and moot; and

(3) Plaintiff's Motion for Expedited Discovery and for Special Trial Setting is denied as untimely and moot.

SO ORDERED THIS 11th day of February, 1982.

/s/ Tom Cauthorn,
TOM CAUTHORN, Judge
State Court of Cobb County

38921

SUPREME COURT OF GEORGIA

ATLANTA, September 7, 1982

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA V. INTERSTATE NORTH ASSOCIATES

From the State Court of Cobb County

It is ordered that this case be hereby transferred to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford, Deputy Clerk

38921

CLERK'S OFFICE, SUPREME COURT
OF GEORGIA

Atlanta, JUN 7 1983

Case No. 39896. Officenters International Corp. of Atlanta v. Interstate North Associates (65253)

The Supreme Court today denied the writ of certiorari in this case.

All the Justices concur, except Gregory, J., dissents.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisidction the equal protection of the laws. * * *

61-301 (5385) Demand for Possession; Proceedings on Tenant's Refusal to Deliver

In all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or shall fail to pay the rent when the same shall become due, and in all cases where lands or tenements shall be held and occupied by any tenant at will or sufference, whether under contract of rent or not, and the owner of the lands or tenements shall desire possession of the same, such owner may, by himself, his agent, attorney in fact or attorney at law, demand the possession of the property so rented, leased, held, or occupied; and if the tenant shall refuse or omit to deliver possession when so demanded, the owner, his agent or attorney at law or attorney in fact may

go before the judge of the superior court or any justice of the peace and make oath to the facts.

(Act 1827, Cobb, 901. Acts 1853-4, pp. 53, 55; 1855-6, p. 268; 1865-6, p. 34.)

61-302 (5386) Summons to be Served on Defendant

(a) When the affidavit provided for in section 61-301 shall be made, the judge of the superior court or such other court with jurisdiction over the subject matter, including the judge of any State court where the action arises or justice of the peace before whom it was made shall grant and issue a summons to the sheriff or his deputy, or any lawful constable of the county where the land lies, a copy of which, together with a copy of the affidavit, shall be personally served upon the defendant. If the sheriff is unable to serve the

defendant personally, service may be had by delivering said summons and affidavit to any person sui juris residing on the premises or, after reasonable effort if no such person is found residing on the premises, by tacking a copy of said summons and affidavit on the door of the premises and on the same day of such tacking, enclosing, directing, stamping and mailing by first class mail a copy of said summons and affidavit to the defendant at his last know address, if any, and making an entry of this action on the affidavit filed in said case.

(b) The summons served on the defendant pursuant to subsection (a) shall command and require the tenant to answer either orally or in writing within seven days from the date of actual service unless the seventh day is a Saturday, Sunday or legal holiday in which case the answer may be made on the

next day which is not a Saturday, Sunday or legal holiday. If the answer is oral, the substance thereof shall be endorsed on the dispossessory affidavit. The answer may contain any legal or equitable defense or counterclaim. The landlord need not appear on the date of the tenant's response. The last possible date to answer shall be stated on the summons. (Act 1827, Cobb, 902. Acts 1895-6, p. 35; 1970, pp. 968, 969; 1971, p. 536; 1976, pp. 1372, 1377; 1978, pp. 938, 939, eff. March 14, 1978.)

61-303 (5387) Answer and Trial

If the tenant fails to answer at or before the date provided in section 61-302(b), the tenant may reopen the default as a matter of right by making an answer within seven days after the date of the default notwithstanding the

provisions of section 81A-155 of the Georgia Civil Practice Act. If the seventh day is a Saturday, Sunday or legal holiday, then the answer may be made on the next day which is not a Saturday, Sunday or legal holiday. Such date shall be stated on the summons. If the tenant fails to answer or open the default, the court shall issue a writ of possession; and the plaintiff shall be entitled to a verdict and judgment by default for all rents due, in open court or chambers, as if every item and paragraph of the affidavit provided for in section 61-301 were supported by proper evidence without the intervention of a jury.

If the tenant answers, a trial of the issues shall be had in accordance with procedure prescribed for civil actions in courts of record. Every effort shall be made by the trial court

to expedite a trial of the issues. The defendant shall be allowed to remain in possession of the premises pending the final outcome of the litigation: Provided, however, that the tenant at the time of his answer pays rent into the registry of the court pursuant to section 61-304.

(Act 1827, Cobb, 902. Acts 1866, p. 25; 1970, pp. 968, 969; 1971, pp. 536, 537; 1976, pp. 1372, 1377, eff. July 1, 1976.)

61-304 (5388) Payment of Rent into Court

In any case where the issue of the right of possession cannot be finally determined within one month from the date of the original affidavit, the tenant shall be required to pay into the registry of the trial court:

(a) All rent which becomes due after the issuance of the dispossessory warrant as said rent becomes due. If

the landlord and tenant disagree as to the amount of rent, the parties, or one of them, may submit to the court any written rental contract for the purpose of establishing the amount of rent to be paid into the registry of the court. If the amount of rent is in controversy and no written rental agreement exists between the tenant and landlord, the court shall require as the amount of rent a sum equal to the last previous rental payment made by the tenant and accepted by the landlord without written objection.

(b) All rent allegedly owed prior to the issuance of the dispossessory warrant provided, however, that in lieu of such payment the tenant shall be allowed to submit to the court a receipt indicating that payment has been made to the landlord. In the event that the amount of rent is in controversy, the

court shall determine the amount of rent to be paid into court in the same manner as expressed in subsection (a) of this section.

(c) If the tenant should fail to make any rental payment as it becomes due pursuant to subsections (a) or (b) of this section, the court shall issue a writ of possession and the landlord shall be placed in full possession of the premises by the sheriff, deputy or constable.

(d) The court shall order the clerk of the court to pay to the landlord the payments paid into the registry of the court as the said payments are made, provided, however, that if the tenant claims that he is entitled to all or any part of said fund and such claim is an issue of controversy in the litigation the court shall order the clerk to pay to the landlord without delay only that

portion of the fund to which the tenant has made no claim in the proceedings. That part of the fund which is a matter of controversy in the litigation shall remain in the registry of the court until a final determination of the issues.

(Act 1827, Cobb, 902. Acts 1970, pp. 968, 970.)

61-305 (5389) Judgment and Satisfaction

(a) If, on the trial of the case, judgment is against the tenant, judgment shall be entered against the tenant for all rents due and for any other claim relating to the dispute.

(b) If judgment is for the tenant, he shall be entitled to remain in the premises and the landlord shall be liable for all foreseeable damages shown to have been caused by his wrongful conduct. Any funds remaining in the

registry of the court shall be distributed to the parties in accordance with the judgment of the court.
(Act 1827, Cobb, 902. Acts 1947, p. 657; 1970, pp. 968, 971.)

61-306 (5393) Appeal

Any judgment by the trial court shall be appealable pursuant to Title 6 of the Georgia Code Annotated. If the judgment of the trial court is against the tenant and the tenant appeals this judgment, the tenant shall remain in possession of the premises: Provided, however, that the tenant shall be required to pay rent into the registry of the trial court pursuant to section 61-304 (a) until the issue has been finally determined on appeal.
(Acts 1878-9, p. 145; 1957, p. 18; 1968, pp. 124, 125; 1970, pp. 968, 971.)

61-307 (5394) Officer Failing in Duty to Give Notice to Tenant

Any officer violating the provisions of the preceeding section, by failing to give the notice therein required, or by executing any such warrant as is therein named before the expiration of three days from the time of said notice, shall be deemed guilty of a trespass, and liable, together with the sureties on his official bond, in damages to the defendant.

61-308 Applicability of Chapter to Croppers and Servants after Termination of Employment

The provisions of this Chapter shall apply to croppers and servants who continue to hold possession of lands and tenements after their employment as such

has terminated, in the same manner as it relates to tenants.
(Acts 1941, p. 319.)

61-309 Offer of Payment by the Tenant

In an action for nonpayment of rent, the tenant shall be allowed to tender, within seven days of the day the tenant was served with the summons pusuant to section 61-302, to the landlord all rents allegedly owed plus the cost of the dispossessory warrant. Such a tender shall be a complete defense to the action: Provided, however, that a landlord is required to accept such a tender from any individual tenant after the issuance of a dispossessory summons only once in any 12-month period.
(Acts 1970, pp 968, 972.)

LEASE AGREEMENT

STATE OF GEORGIA

COUNTY OF COBB

THIS LEASE AGREEMENT, dated this 11th day of March, 1981, by and between INTERSTATE NORTH ASSOCIATES whose address for purposes hereof is 300 Interstate North, Suite 285, Atlanta, GA. 30339 (hereinafter called "Lessor"), and OFFICENTERS INTERNATIONAL CORPORATION OF ATLANTA, A Delaware Corporation whose address for purposes hereof is One World Trade Center, New York, NY 10048 (hereinafter called "Lessee"):

WITNESSETH:

PREMISES

Description of Premises

1. Subject to and upon the terms, provisions and conditions herein set forth, Lessor does hereby lease, demise, and rent to the Lessee and the Lessee does hereby lease, demise, and rent from the Lessor the following described space in Building 360, Interstate North Office Park located in Atlanta, Georgia as shown in Exhibit B attached hereto and as further described below:

Approximately 25,051 square feet of office space located on the Fourth Floor and known as Suite 400.

* * *

TERM

* * *

Commencement

4. The date on which possession of the leased premises is taken by Lessee will establish the commencement of rent

on this Lease if possession is taken before the 1st day of June 1981. If for any reason Lessor fails to deliver the leased premises ready for occupancy on the above date, this Lease shall remain in full force and effect and Lessor shall have no liability to Lessee due to delay in occupancy and rental shall commence when said premises are ready for occupancy. If a delay in having premises ready for occupancy is occasioned by Lessee, or if leased premises are ready for occupancy on the above date but Lessee does not take occupancy, rental in either case will commence as of the above date.

* * *

RENT

Monthly Rent

6. As consideration for this Lease and the services to be provided herein

by Lessor, Lessee shall pay to Lessor at its offices as stated above or at such other place as Lessor shall designate in writing to Lessee, promptly on the first day of each month, in advance, during the term of this Lease, a monthly base rental of Twenty-Three-Thousand-Four-Hundred-Eighty-Five and 31/100 Dollars ($23,485.31) (the "Base Rental"), except as otherwise provided herein.

* * *

Additional Rental

8. All payments, other than those previously specified above, as required in this Lease by Lessee to Lessor shall be deemed to be and shall become additional rent hereunder, whether or not the same shall be designated as such, and shall be due and payable along with usual rental payments subject to the same conditions and remedies as exist for said rental payments.

* * *

62. Notwithstanding Paragraph 14 of this Lease Agreement, the premises shall be used for business offices, including without limitation the following:

(i) subleasing or licensing of office units of space in the premises to other persons, firms and corporations;

(ii) furnishing telephone answering service, secretarial services, temporary help, postal mail box service, photo copy and instant printing service, word processing service, telecommunications, telex, telephone and similar services, data and other executive information services, and other office services to other persons, firms and corporations;

(iii) conference facilities, including video conferencing for other persons, firms and corporations.

* * *

65. Notwithstanding Paragraph 16 of this Lease Agreement, Lessee shall have the right to assign or sublet the leased premises, in whole or in part, to any affiliated of [sic] successor corporation. Lessor agrees to release Lessee from all obligations of the Lease under this Lease in the event the obligations of the Lessee under this Lease are assumed by an affiliated or successor corporation whose financial responsibility is, in Lessor's reasonable opinion, equivalent to or greater than that of Lessee.

66. Notwithstanding Paragraph 16 of this Lease Agreement, Lessee may sublet the demised premises in whole or in part as a direct function of the Lessee's business operation as defined in Paragraph 62 above, without the Lessor's consent provided:

(i) the subtenant is of character and engaged in a business in keeping with the standards of the building;

(ii) the use of the sublet premises is in keeping with the standards of the building and is not in violation of the Lease;

(iii) Lessee is not in default under the Lease beyond any applicable period of notice or grace;

(iv) Lessee remains fully liable under the Lease; and

(v) the sublease does not permit assignment or further subletting.

* * *

88. Notwithstanding anything to the contrary contained in this Lease Agreement, wherever Lessor's consent is requested in this Lease Agreement, the Lessor agrees that such consent shall not be unreasonably withheld or delayed.

* * *

90. Lessor hereby agrees to defer the Lessee's base monthly rental for a period of six (6) calendar months beginning with the payment of rent normally due for the month of June 1981, and ending with the payment of rent normally due for the month of November, 1981. The total amount deferred shall be equal to One-Hundred-Forty-Four-Thousand-Four-Hundred-Forty and 28/100 ($144,440.28) computed by taking the sum of the six calendar months or One-Hundred-Forty-Thousand-Nine-Hundred-Eleven and 88/100 ($140,911.88) at twelve (12%) percent interest per annum for six (6) months. This amount then, One-Hundred-Forty-Four-Thousand-Four-Hundred-Forty and 28/100 ($144,440.28) shall be amortized over a period of One-Hundred-Forty-Four (144) months at twelve (12%) percent interest per annum

and paid by Lessee to Lessor in One-Hundred-Forty-Four (144) equal monthly payments of One-Thousand-Eight-Hundred-Seventy-Eight and 32/100 ($1,878.32) due with payment of the regular base monthly rental as described in Paragraph 8, beginning December 1, 1981 and ending with payment of the regular base monthly rental for November 1, 1993. The above described deferral of rental shall result in Lessee paying to Lessor no monthly rental beginning at the commencement of this Lease Agreement, June 1, 1981 and ending November 31, 1981, at which time the regular monthly base rental as described in Paragraph 6, plus, the deferred amount as described above will go into affect. For further clarification, see the rental schedule below.

PERIOD	BASE MONTLY RENTAL	DEFERRED MONTHLY RENTAL	TOTAL MONTHLY RENTAL
6/1/81 - 11/30/81	$ -0-	$ -0-	$ -0-
12/1/81 - 5/31/82	$23,485.31	$1,878.32	$25,363.63

* * *

[Exhibit "E"]

INITIAL IMPROVEMENTS OF THE PREMISES

Installation of Improvements

1. Lessor shall furnish and install within the premises, substantially in accordance with plans and specifications approved by Lessee and Lessor, partitions, doors, lighting fixtures, acoustical ceilings, resilient tile or carpet floor covering, Building Standard window covering, electrical outlets, telephone outlets, air conditioning and other improvements required by Lessee which are normally

performed by the construction trades. The quantities, character and manner of installation of all of the foregoing items shall be subject to the limitations imposed by any applicable regulations relating to conservation of energy and/or life safety requirements adopted by any governmental agency. Lessor shall also cause to be provided architectural and mechanical and electrical engineering services required in connection with the foregoing items.

Building Standard Improvements - Lessor's Work

2. As Lessor's contribution to the work provided for in Paragraph 1, Lessor shall provide to Lessee a leashold improvement allowance of One-Hundred-Thirty-Seven-Thousand-Seven-Hundred-Eight and 50/100 ($137,780.50 (hereinafter referred to as "Lessor's Work"). [sic] This amount is to be used

by Lessee for the preparation and improvement of the demised premises exclusive of amounts to be spent by Lessor for items to be completed in the demised premises which are considered a part of the base building construction. Base building construction icludes:

(a) Heating, Ventilation and Air-Conditioning Duct work, supply and return grills and thermostats served by a central outside air system to provide air-conditioning to suit normal general office space occupancy. Any special zones, exhausts, or air supply needs which are required for areas such as conference rooms or computer, reproduction or other areas with heat generating equipment shall constitute part of Lessee's work.

(b) Ceiling--Lessor standard recessed grid ceiling system. Acoustical panels shall be 2' x 2' x

5/8" with shadowline pattern. (Intallation of acoustical panels shall be included in Lessee's work.)

(c) Lighting--One Lessor standard 2' x 4' flourescent light fixture (laid in ceiling at random locations, not connected) for each eight (80) square feet of net usable area in the premises.

(d) Window Coeverings--Lessor standard Levelor "Riviera" blinds on all exterior windows.

Non-Building Standard Improvements-Lessee's Work

3. Lessee shall bear the cost of the work described in Paragraph 1 over and above what is provided by Lessor under Paragraph 2 (hereinafter referred to as "Lessee's Work"). Any modifications of any part of Lessor's Work that has already been completed that are requested by Lessee shall constitute part of Lessee's Work.

Approval of Plans and Cost Estimate

4. (a) Lessor and Lessee shall diligently pursue the preparation of all plans and specifications for the improvements provided for in Paragraph 1. All such plans and specifications shall have the approval of both Lessor and Lessee, which approval shall not be unreasonably withheld by either party. Complete plans and specifications and a cost estimate for the portion of the work covered thereby to be borne by Lessee shall be approved by Lessor and Lessee no later than the date specified in the Basic Lease Information in accordance with the procedure set forth in (b) below.

* * *

5. Lessee's obligation hereunder to pay rental shall not commence until Lessor has substantially completed all work to be performed by Lessor under

this Exhibit "E" and in accordance with "B-1". Substantial completion of all work shall be jointly determined by Lessor and Lessee. If Lessor shall be delayed, however, in substantially completing said work as a result of:

(a) Lessee's failure to approve plans, specifications and cost estimate on or before the date referred to in Paragraph 4(a) or

(b) Lessee's change(s) in plans and specifications after said date, or

(c) Lessee's request for materials, finishes or installations requiring long lead times for ordering which exceed the amount of time actually spent to construct the space,

then the commencement of rental shall be accelerated by the number of days of such delay.

Payment of Lessee's Cost

6. Lessee shall pay to Lessor all amounts payable by Lessee pursuant to this Exhibit "E" within 10 days after billing by Lessor. Bills may be rendered during the progress of the work so as to enable Lessor to pay its general contractor, architect or engineer without advancing Lessor's funds for Lessee's work.

* * *